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STAFF REPORT
SECTIONS A14-14 THRU A14-25 OF THE SUFFOLK COUNTY ADMINISTRATIVE CODE

Applicant: Temporary Moratorium on the Issuance of Approvals and/or permits for Battery Energy Storage Systems (BESS)
Municipality: Town of Southold
Location: Town-Wide

Received: 3/1/2023
File Number: SD-23-03

Jurisdiction: Moratorium – Amendment to the Southold Zoning Law

OVERVIEW – The Town of Southold is proposing a local law (2023-164) for the temporary moratorium on the issuance of approvals and/or permits for Battery Energy Storage System (BESS) facilities, to last twelve (12) months from its adoption.

As provided by the Town, the proposed moratorium is verbatim as follows:

I. Purpose

The Town recognizes that Battery Energy Storage System (BESS) facilities are a key component to the viability and promotion of renewable energy sources, however, the technology of these systems is still in its infancy. This moratorium is necessary to permit the Town to undertake a thorough examination of these systems to identify any possible threats to public health, safety and welfare as well as evaluate the potential for environmental degradation. These issues are of great public concern and it is important that the potential for any risks is thoughtfully reviewed with in-depth analysis and that mitigation measures are identified to ensure the continued protection of our community and of our environment. Such findings will assist in the crafting of code that will determine criteria for future siting, site design, safety requirements and all other elements that may be necessary for approval.

II. Enactment of a Temporary Moratorium

Until twelve (12) months from the effective date of this Local Law, after which this Local Law shall lapse and be without further force and effect and subject to any other Local Law adopted by the Town Board during the twelve (12) month period, no agency, board, board officer or employee of the Town of Southold including but not limited to, the Town Board, the Zoning Board of Appeals, the Trustees, the Planning Board , or the Building Inspector(s) issuing any building permit pursuant to any provision of the Southold Town Code, shall issue, cause to be issued or allow to be issued any approval, special exception, variance, site plan, building permit, subdivision, or permit for any use identified as a Battery Energy Storage System (BESS) facility.

III. Exclusions

This Local Law shall not apply:

- 1) To any person or entity who/which has, prior to the effective date of this Local Law, obtained all permits required for such a facility and, relying upon such permission, has undertaken significant development of such facility.
- 2) To any application by a municipal corporation or special district or fire district.

IV. Authority To Supersede

To the extent and degree any provisions of this Local Law are construed as inconsistent with the provisions of Town Law, this Local Law is intended pursuant to Municipal Home Rule Law to supersede any said inconsistent authority.

V. Variance To This Moratorium

Any person or entity suffering unnecessary hardship as that term is used and construed in Town Law section 267-b(2)(b), by reason of the enactment and continuance of this moratorium, may apply to the Town Board for a variance excepting the proposed use from the temporary moratorium and allowing issuance of a permit all in accordance with the provisions of this Southold Town Code.

VI. Severability

If any clause, sentence, paragraph, section, or part of this Local Law shall be adjudged by any court of competent jurisdiction to be invalid, the judgment shall not impair or invalidate the remainder of this Local Law.

VII. Effective Date

This Local Law shall take effect immediately upon filing with the Secretary of State.

BACKGROUND – Over the past few years, the development of BESS related facilities have been proposed and developed all over the world, including in the United States. On a more local note recently an article was published by Phillip A. Butler on January 23, 2023, titled “*The Long Island Land Use and Zoning: To BESS, or Not to BESS? The Emergence of Battery Storage Systems on Long Island.*”

The article cites that while most people envision “green energy” of solar panels and wind turbines, there has been a movement toward renewable energy, and a more reliable and efficient power grid, involves many other forms of technology that may yet be unfamiliar to the average person. As the push to expand green energy production grows, so too will the prevalence of the technologies needed to support the industry. On Long Island, communities are witnessing the introduction of a previously unfamiliar form of green-adjacent technology in the form of BESS facilities, referred to in the article as “green-adjacent” because, unlike wind and solar farms, they do not produce electricity of their own; instead, they store it, and as such, so far local reception of these uses has been mixed.

The BESS type facilities generally consist of rows of rechargeable batteries housed in self-contained, interconnected storage units. These facilities typically operate by drawing surplus energy from the local power grid during periods of low usage and storing it for later distribution back into the grid during peak demand. However, they can also be used as direct storage for electricity produced by renewable energy production facilities, like wind and solar farms. In either case, BESS stabilize the local power grid by ensuring reliability during periods when the grid might otherwise experience a partial or total deficit in voltage, commonly known as “brownouts” and “blackouts”. Thus, proponents of BESS offer that these facilities can reinforce the local power grid not only on a daily or routine basis, but also during emergencies when demand is especially high or when electrical transmission from outside the local grid is severed.

From a land use perspective, BESS facilities are generally cited as a low-impact uses. Once a facility is constructed and operational, it often requires no regular staffing, only routine maintenance. This results in virtually no traffic, and almost no need for onsite parking. The facilities can also be monitored remotely, which further reduces traffic, and onsite staffing and parking. Site lighting at BESS facilities is also largely unnecessary, except for security purposes. The absence of employees also means there is virtually no water consumption at BESS facilities, and commensurately, little to no sewage.

The article notes that the only potentially significant planning concern associated with BESS facilities is often noise generated by cooling fans. However, noise is not always a problem depending on the size and configuration of a project. In instances where noise may be an issue, the industry has implemented methods of noise mitigation, including the use of sound barriers and landscaping.

Opponents of these facilities have raised concerns over the presence of highly flammable substances, such as from lithium-ion batteries, and possible air and groundwater contamination. Historically, concerns about such threats were resolved by zoning certain uses out of residential areas and restricting them to high-intensity industrial districts. However, that is not always feasible with BESS. These facilities must connect to the local power grid through a substation with adequate capacity to accommodate the transmission between the facility and the grid. The greater the distance between a BESS facility and the substation, the less efficient the transmission will be. As a result, designing a viable BESS facility may require that a BESS facility be located in or near a residential district in some cases. This is certain to be the situation in more urbanized areas of Long Island, where there is high density of uses and districts in close proximity to one another. Thus, planning for the future of BESS facilities on Long Island will not be without its challenges.

On Long Island, to date, only four (4) of Long Island's thirteen (13) towns to adopt zoning regulations for BESS facilities: the Towns of Brookhaven, Huntington, Islip, and Southampton. The article notes that the Riverhead Town Board has recently discussed a set of draft BESS regulations based on the model law published by the New York State Energy Research and Development Authority (NYSERDA) (<https://www.lilanduseandzoning.com/wp-content/uploads/sites/128/2023/01/NYSERDA-model-1.pdf>). The article also notes that other towns, like the Town of Southold, are discussing possible moratoria on BESS facilities out of concern for potential environmental impacts and public safety.

The Town of Brookhaven enacted its BESS zoning regulations in February 2020, set forth in Sections 85-814 through 85-817 of the Town's Zoning Code, (<https://www.lilanduseandzoning.com/wp-content/uploads/sites/128/2023/01/Brookhaven-4.pdf>). Like the NYSERDA model, Brookhaven's regulations separate BESS facilities into two (2) tiers based on system capacity. Tier I projects are BESS facilities having capacity up to 599 kilowatt hours (kWh), permitted in the Town's J-2 and J-5 Business Districts by special permit from the Brookhaven Planning Board, and permitted by right in the Town's L-1, L-2, and L-4 Industrial Districts. Tier II projects are BESS facilities having capacity of 600 kWh or greater, and are restricted to the L-1, L-2, and L-4 Industrial Districts. Brookhaven's BESS regulations also include a 40,000 sq. ft. minimum lot size for all BESS projects, moderate to substantial setback requirements, and various other design standards affecting clearing, site lighting, and noise mitigation. The code further requires the approval of a decommissioning plan and the posting of decommissioning bond.

The Town of Huntington enacted its BESS zoning regulations in October, 2020, set forth in Section 198-68.3 of the Town's Zoning Code (<https://www.lilanduseandzoning.com/wp-content/uploads/sites/128/2023/01/Huntington-1.pdf>). Unlike Brookhaven, the Town of Huntington does not separate BESS projects into tiers. Instead, facilities that are two (2) acres or larger and within 200 feet of a residential district require a Planning Board special permit. The code is otherwise fairly generous toward BESS projects, allowing them as principal permitted uses in all Light Industrial Districts (I-1 through I-4) in addition to the General Industrial (I-5) and Generating Station (I-6) Districts. BESS projects are also permitted as accessory uses in these districts, and by special permit in the General Business (C-6) District, if they occupy 2% or less of the project site and serve another building or facility on the same premises. Like Brookhaven, the Town of Huntington's BESS regulations include several design requirements affecting setbacks, height, site lighting, and noise mitigation. The approval of a decommissioning plan is also required.

The Town of Islip enacted its BESS zoning regulations in July 2022, set forth in Section 68-456 of the Town's Zoning Code (<https://www.lilanduseandzoning.com/wp-content/uploads/sites/128/2023/01/Islip-1.pdf>). The Town of Islip operates on a three (3) tier classification system, with Tier III being the largest (601 kWh or greater) followed by Tier II (81-600 kWh), and then Tier I (80 kWh or smaller). Tier I BESS are permitted in all zoning districts in the Town. Tier II BESS are permitted in the Town's B-1, B-2, and B-3 Business District in addition to its Industrial Districts (excluding Industrial Business [I-B]). Tier III BESS are restricted to the Industrial 1 and Industrial 2 Districts only. In addition to imposing design standards and decommissioning requirements similar to Brookhaven and Huntington, the Town of Islip code includes specific provisions regarding commissioning plans, project operations, and safety during a project's lifetime.

The Town of Southampton enacted its BESS zoning regulations in January 2021, set forth in Section 330-162.21 of the Town's Zoning Code (<https://www.lilanduseandzoning.com/wp-content/uploads/sites/128/2023/01/Southampton-1.pdf>).

<content/uploads/sites/128/2023/01/Southampton-1.pdf>). In Southampton (outside the incorporated villages), BESS facilities are permitted in all zoning districts, including residential districts, subject to varying standards depending on the district in question. Additionally, Southampton sets aside specific “avoidance areas” having special environmental, historical, cultural, or recreational value where BESS facilities are prohibited. Like the other towns discussed, Southampton imposes specific standards governing setbacks, site lighting, and noise mitigation, among other things. It also requires a decommissioning plan, and payment into a “decommissioning fund”.

STAFF ANALYSIS

As noted in the past by the Suffolk County Planning Commission, a moratorium on development is a local law or ordinance that suspends the right of property owners to obtain development approvals while the community takes time to consider, draft or adopt land use plans or rules to respond to new or changing circumstances not adequately dealt with by its current law. A moratorium preserves the status quo for a reasonable time. A moratorium is, from one perspective, the most extreme land use action that a municipality can take because it suspends completely the rights of owners to use their property. Such development moratoria may be general or specific. A general imposes a ban on all development within a community (allowing for certain hardship exemptions), while a specific moratorium may prevent development approvals in a specific geographic area or of a certain type of development.

Staff finds that the proposed moratorium is specific and would not restrict all development on any or all parcels within the Town; rather, the proposed moratorium is limited to BESS facilities only, and for twelve (12) months to allow the Town further review of new zoning for such facilities. The moratorium, although a full year long, is specific and appears legitimate to be reasonable.

There has also been local support for the proposal. On March 9, 2023, the Zoning Board of Appeals for the Town of Southold sent a memorandum of support to the Town Supervisor and Town Councilmembers. The contents of the letter are verbatim as follows:

“We are writing to ask you to vote in favor of the proposed moratorium on lithium-ion battery energy storage system (BESS) facilities. We know that voting to impose a moratorium is never an easy decision and it's one that should not be undertaken lightly. But in this case, we unanimously believe it is the right thing to do.

You will recall that in 2021 the ZBA, for the first time, heard a special exception permit application for a BESS facility. We did so with the understanding that the Planning Board, the LWRP Coordinator and New York State supported BESS facilities as a green energy technology that would eventually eliminate polluting Peaker plants. We believed the ZBA, the town and the public needed to learn more about this forthcoming green technology. Now we have. Since then both the Board and our fellow Southold residents have learned a great deal more about BESS facilities, especially the lithium-ion batteries used in these systems.

We now understand that the out-of-control fires caused by lithium-ion batteries, occurring at alarm rates all over the country, including our own town, present serious dangers to our first responders, can cause damage to adjacent properties, and can create both air and ground water pollution that degrades human and environmental health. We now realize that BESS facilities are built and operated by private companies that do not generate energy but rather store energy they purchase cheaply at off peak hours and re-sell to the electrical utility company at a higher price to meet peak energy demands. We have learned

that they are only as green as the energy source they are connected to; and that the communities in which they are located do not necessarily benefit directly from the additional available energy since it simply goes back into the electric grid and is distributed by and where the utility company decides to send it.

Our town's zoning code was written long before this relatively new technology existed. Consequently, there is no guidance in the bulks schedule specifically for BESS facilities. Should they be treated the same as other uses permitted by special exception in an LI Zone such as boat and marine repairs, conference facilities, bus terminals and food processing plants? Should they have the same setbacks and protective buffers, lot coverage and height restrictions? Should they be permitted in other zones? Should they be permitted at all?

The proposed moratorium will provide the time needed to answer these and other compelling questions, and could not be timelier. To facilitate the implementation of the Town's Comprehensive Plan you recently hired an experienced zoning consultant to examine and update our outdated zoning code, including uses that should be permitted in various zone districts. Without this town wide planning, the Board of Appeals will be required to hear BESS applications - several more already pending — on a piecemeal basis, without appropriate guidance on how to clearly define what these facilities are, and where and under what conditions they should be allowed.

We need new code for these BESS facilities, and the ZBA believes that the Town Board, as our elected legislators, should now proactively exercise its authority and responsibility to legislate with the best interests of the Town, and the welfare of its residents in mind.

The ZBA implores you to give the Zoning and Planning Boards the legal tools we need to make informed and environmentally responsible decision about BESS facilities that balance the reasonable rights of property owners with the health, safety and welfare of our community.

Please give yourselves the time to do the homework, talk to the experts, analyze the risks and how to mitigate them, and to look at the big picture. The ZBA urges all of you to vote in favor of the proposed moratorium.”

Additionally, on March 14, 2023, the Southold Planning Board issued the following comment on the proposed Local Law, in relation to consistency with the Southold Town Comprehensive Plan:

“The Southold Comprehensive Plan adopted in 2020 does not contemplate the science and function of Battery Energy Storage System (BESS) facilities; rather, it focuses on the siting and science of renewable energy. A Battery Energy Storage System is not renewable energy, rather, it is a storage facility that manages and profits from off-peak and peak energy use management.

The Southold Town Comprehensive Plan and town zoning should be updated to include the siting and the management of BESS facilities. A moratorium would allow the decision makers to better understand the science of BESS facilities and identify areas where they fit into the Town's land use and zoning districts, energy dependency, and if they provide a measurable public benefit.”

Staff understands that this proposal as of now is just a moratorium for the Town of Southold to further study how best it might move forward with future approvals and/or permits of BESS

facilities. It is expected that during the timeframe of the moratorium that the Town will study the same issues as the other Towns on Long Island that have adopted BESS related zoning regulations, as well as those specific to the local Southold community.

STAFF RECOMMENDATION

Approval of proposed Local Law of 2023-164 of the Town of Southold creating a temporary moratorium on the issuance of approvals and/or permits for Battery Energy Storage System (BESS) facilities, subject to the following comments:

1. The Town should consider if a reduction of the proposed twelve (12) month temporary moratorium to a potential shorter duration of six (6) or nine (9) months would still allow the Town ample time to study the situation and their concerns, yet not prohibit the issuance of any BESS approvals and/or permits for an entire year.
2. The Town should confirm that the temporary moratorium will only apply to BESS related applications and not deem a larger proposed application unfit for review if a portion of such proposal includes a BESS facility; rather that BESS portion of such a proposed application may not move forward but yet allow the remainder of said application to continue to be reviewed by the Town.
3. The Town is encouraged to review the regulations adopted by other Long Island municipalities, as well as others nationally that may relate to BESS facilities, to help better understand and issue appropriate regulations that would allow for the development of these facilities while adhering to the Town's concerns.